

ORIGINAL

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

In the Matter of

Redesignation of the 17.7-19.7 GHz
Frequency Band, Blanket Licensing of
Satellite Earth Stations in the 17.7-20.2 GHz
and 27.5-30.0 GHz Frequency Bands, and the
Allocation of Additional Spectrum in the
17.3-17.8 GHz and 24.75-25.25 GHz
Frequency Bands for Broadcast Satellite-
Service Use

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) **DOCKET FILE COPY ORIGINAL**

) **IB Docket No. 98-172**

) **RM-9005**

) **RM-9118**

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**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY**

**COMMENT AND OPPOSITION TO PETITION FOR CLARIFICATION AND
RECONSIDERATION OF WINSTAR COMMUNICATIONS, INC.**

Pegasus Development Corporation ("Pegasus") hereby opposes the Petition for Clarification and Reconsideration of Winstar Communications, Inc. ("Winstar Petition"), and also comments on issues related to the new Broadcast Satellite Service ("BSS") allocation at 17.3-17.7 GHz. Winstar fails to present any new evidence or other compelling reason for the Commission to modify the terrestrial fixed service ("FS") relocation policy adopted in the 18 GHz downlink allocation band order. With respect to the new BSS allocation, Pegasus urges the Commission to permit BSS operators to use the 17.7-17.8 GHz band for downlink purposes on a secondary basis.

Background

Pegasus. Pegasus is an applicant in the second Ka-band application processing round. See SAT-LOA-19980403-00025-29. Through its proposed Geostationary Fixed Satellite Service ("GSO/FSS") system, consisting of ten satellites, Pegasus proposes to provide a broad range of

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multimedia services, consisting primarily of wide-band, high-speed data transmission to ubiquitously deployed earth terminals. Accordingly, Pegasus has a direct interest in this proceeding, and in the Commission's treatment of the Winstar Petition.

The Downlink Order. On June 22, 2000, the Commission released its Downlink Order redesignating the spectrum allocation for the 18 GHz band (17.7-20.2 GHz) among terrestrial FS, GSO/FSS, Non-Geostationary Satellite Orbit Fixed-Satellite Service ("NGSO/FSS"), and Mobile-Satellite Service feeder links ("MSS/FL").¹ The Downlink Order divided the 18 GHz downlink band into new band segments, established policies for the relocation of incumbent FS licensees now located in new FSS bands, and established rules for the blanket licensing of Ka-band earth terminals.

Under the relocation policies adopted in the Downlink Order, incumbent FS operators located in new FSS spectrum are granted co-primary status for a period of ten years. This co-primary status is subject, however, to the right of FSS licensees to enter into negotiations with terrestrial operators for the purpose of relocating the FS operator to comparable facilities in other fixed microwave bands or in other media. (*See Downlink Order*, at ¶81. Parties may also enter into a sharing arrangement.) The Downlink Order, consistent with the Commission's decision in the Emerging Technologies proceeding, defines "comparable facilities" in terms of throughput, reliability, and operating costs.² In order for a replacement facility to be comparable, its

¹ *Redesignation of the 17.7-19.7 Ghz Frequency Band, Blanket Licensing of Satellite Earth Stations in the 17.7-20.2 GHz and 27.5-30.0 GHz Frequency Bands, and the Allocation of Additional Spectrum in the 17.3-17.8 GHz and 24.75-25.25 GHz Frequency Bands for Broadcast Satellite-Service Use*, FCC 00-212, 2000 FCC LEXIS 3200 (June 22, 2000) ("Downlink Order").

² *See Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for Use by the Mobile-Satellite Service*, ET Docket No. 95-18, *Second Report and Order and Second*
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throughput must be equivalent to the FS licensee's system use at the time of relocation; it does not, however, have to match the total potential capacity of the FS system. *See Downlink Order*, at Appendix A, §101.89(d)(1).

Once an FSS licensee initiates negotiations, there is a mandatory negotiation period of up to two years (three years for public safety licensees). *See id.* If there is no agreement during this period, the incoming FSS licensee may require the FS operator to relocate to comparable facilities. *See Downlink Order*, at Appendix A, §101.91. The incoming FSS licensee must pay all relocation costs, and it must construct and test the replacement system for comparability. *See id.* FS operators have no right of return to their original spectrum. *See id.* Finally, at the end of this ten-year co-primary period (from the date of adoption of the Order),³ incumbent FSS licensees will no longer be required to compensate FS incumbents for such relocation.

With respect to the spectrum allocation for BSS, the Commission in the Downlink Order designated the 17.3-17.7 GHz band (downlink) and 24.75-25.05 GHz band (uplink) for primary BSS use. *See Downlink Order*, at ¶96. This allocation is largely consistent with the ITU allocation for BSS in Region 2, except that the Commission reserved the 17.7-17.8 GHz band for

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Memorandum Opinion and Order, 2000 FCC Lexis 3464, at ¶91 (July 3, 2000); *see also Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies, First Report and Order and Third Notice of Proposed Rulemaking*, 7 FCC Rcd 6886 (1992); *Second Report and Order*, 8 FCC Rcd 6495 (1993); *Third Report and Order and Memorandum Opinion and Order*, 8 FCC Rcd 6589 (1993); *Memorandum Opinion and Order*, 9 FCC Rcd 1943 (1994); *Second Memorandum Opinion and Order*, 9 FCC Rcd 7797 (1994).

³ *See Downlink Order*, at Appendix A, §§74.502(c), 74.602(g), 78.18(a)(4), and 101.147. Stations operating in the 19.26-19.30 GHz are entitled to relocation costs on a permanent basis.

terrestrial FS use with the caveat that it would reexamine in a future proceeding FS operators' continued need for this spectrum. *See id.* Because the Commission set an effective implementation date of April 1, 2007 for this BSS spectrum allocation, it declined to address at this time issues such as satellite spacing requirements and BSS power flux-density ("pfd") limitations. *See id.* at ¶¶100-101.

Winstar's Petition. The Winstar Petition requests reconsideration of the Commission's determination that incoming licensees should be required to provide relocated FS incumbents with no more than throughput equal to the capacity of the FS system being used at the time of the relocation. Winstar argues that the Commission did not properly consider the anticipated growth of the FS market, and that incoming FSS licensees should instead be required to provide replacement facilities capable of providing spectrum equal to an incumbent licensee's total capacity. *See Winstar Petition*, at 9-11. In addition, Winstar asserts that incumbent FS operators should be granted the right to return to their previous facilities within a twelve-month period if the relocation proves to be unsatisfactory. *See Winstar Petition*, at 16-17. Winstar suggests that a right of return is necessary to induce incoming licensees to engage in good faith negotiations and, further, that such a right is consistent with the Commission's Emerging Technologies proceeding.⁴

⁴ *See Winstar Petition*, at 17. Winstar also seeks clarification on whether an incumbent licensee is required to relocate if comparable facilities are not offered by the incoming licensee, and on whether license assignments and transfers of control by incumbent licensees will result in loss of primary status. *See id.* at 5-8. Pegasus does not comment on these clarification requests in this opposition.

Discussion

Reconsideration of an order is appropriate only where the petitioner presents new data or arguments in support of its position; it is well settled that reconsideration will not be granted merely to relitigate matters already resolved.⁵ Winstar's Petition presents arguments that it has raised before or that have been addressed by the Commission in other related proceedings. As such, the Commission should deny Winstar's requests for reconsideration for the same reasons that it adopted the challenged actions in the Downlink Order.

I. FSS LICENSEES SHOULD BE REQUIRED TO PROVIDE INCUMBENTS ONLY WITH THROUGHPUT THAT IS EQUIVALENT TO THEIR ACTUAL SYSTEM USE AT THE TIME OF RELOCATION

The Commission should reject Winstar's assertion that FSS licensees should be required to provide FS incumbents with throughput that is equal to their total system capacity at the time of relocation. The Commission has squarely addressed this issue in another relocation proceeding, where it similarly concluded that replacement facilities need only provide capacity equal to that actually used at the time of relocation.

While we understand the desire of FS incumbents to provide for possible future needs by purchasing systems with excess capacity, we do not believe that it is the responsibility of ... new technology licensees to provide more than the relocated incumbents' needs at the time of relocation. Future needs are speculative and completely beyond the control of [incoming licensees.] It is appropriate for FS incumbents to make business plans and decisions in anticipation of future needs, but we do not agree that

⁵ See, e.g., *Reorganization and Revision of Parts 1, 2, 21 and 94 of the Rules to Establish a New Part 101 Governing Terrestrial Microwave Fixed Radio Services*, 15 FCC Rcd 3129, at ¶97 (citing *WWIZ, Inc.*, 37 FCC 685, 686 (1964), *aff'd sub nom.*, *Lorrain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966)) (February 14, 2000); see also 47 C.F.R. §1.429(c).

[incoming licensees] should be required to subsidize the future business growth of FS incumbents.

Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for Use by the Mobile-Satellite Service, Second Report and Order and Second Memorandum Opinion and Order, ET Docket No. 95-18, 2000 FCC Lexis 3464, at ¶91 (July 3, 2000).

The rules adopted in this Order are consistent with this precedent, and Winstar fails to refute this rationale. While Winstar claims that the Commission's Downlink Order did not properly take into consideration the future needs or expected growth of the FS industry (*Winstar Petition*, at 9-15), the Commission was in fact quite clear regarding its assessment of the anticipated needs of all licensees.

We have attempted to protect the existing fixed terrestrial operations in this band to the maximum extent possible, while at the same time providing for the growth of both satellite and terrestrial services.

Downlink Order, at ¶2. Thus, in coming to this decision, the Commission balanced the competing FSS and FS interests and concluded rationally that the public interest in efficient and expeditious market entry of FSS licensees outweighed the competing interest in the growth of the FS market.⁶

II. FS INCUMBENTS SHOULD HAVE NO RIGHT OF RETURN TO THEIR ORIGINAL SPECTRUM

In order to provide FSS licensees with reasonable flexibility to develop their operations in a timely and economic manner, the Commission specifically denied relocated FS incumbents

⁶ See *Downlink Order*, at ¶97 ("Our objective is to provide for new satellite services without compromising on our intentions to provide adequate, albeit reduced, continuing spectrum for the FS.")

the right of return to their original facilities. *See Downlink Order*, at ¶82. The Commission stated that “[i]t would not be in the public interest to allow a right of return to relocated incumbents The disruption to national, or potentially region-wide, or world-wide, satellite systems for the benefit of relatively few terrestrial fixed incumbents is infeasible.” *Id.* Winstar fails completely to address the Commission’s explanation for this policy.

Even if Winstar could adequately dispel the Commission’s concern regarding disruption to FSS development in the Ka-band, a right of return is not necessary in light of the Commission’s other procedural safeguards. As indicated above, the Commission’s rules require that the FSS licensee guarantee payment of relocation costs, complete all activities necessary for implementing the replacement facilities, and build and test the replacement system for comparability. *See id.* Further, “[t]errestrial fixed service operators are not required to relocate until the alternative facilities are available for a reasonable time to make adjustments, determine comparability, and ensure a seamless handoff.” *Id.* Finally, the Commission granted relocated incumbents the right to petition the Commission for additional modification or replacement of their equipment in any case where the incumbent believes it has not received comparable performance from its retuned or replaced equipment. *See id.*

These rigorous requirements are adopted from the well-established procedures developed in the Emerging Technologies proceeding and are more than sufficient to ensure that incumbent licensees are adequately protected.⁷ Winstar’s unsupported claim that “the petition process ...

⁷ *See Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies, First Report and Order and Third Notice of Proposed Rulemaking*, 7 FCC Rcd 6886 (1992); *Second Report and Order*, 8 FCC Rcd 6495 (1993); *Third Report and Order and Memorandum Opinion and Order*, 8 FCC Rcd 6589 (1993);

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[would be] slow, agonizing and generally unsatisfactory” is speculative and unsupported by any evidence. *Winstar Petition*, at 18. Accordingly, the Commission should uphold its decision to deny FS incumbents any right of return to original spectrum.

III. THE COMMISSION SHOULD PERMIT BSS DOWNLINK OPERATIONS IN THE 17.7-17.8 GHZ BAND ON A SECONDARY BASIS

In order to compensate FS operators for the reallocation of some Ka-band FS spectrum to other uses, the Commission in the Downlink Order decided that FS operators should retain use of the 17.7-17.8 GHz band, thereby limiting the BSS downlink spectrum allocation to the 17.3-17.7 GHz. The Commission did state, however, that it intends to reexamine the need for this 17.7-17.8 GHz FS allocation in a future proceeding. *See Downlink Order*, at ¶96. Pegasus recommends that, pending this reexamination, the Commission adopt a secondary allocation to BSS in the 17.7-17.8 GHz band. Because BSS downlinks will not cause interference to FS operations, secondary status would allow BSS operators to provide additional services in areas where there are no FS operations without hampering the provision of FS services generally.

In addition, Pegasus urges that the Commission to proceed expeditiously in developing its 18 GHz BSS service rules, including satellite spacing and pfd limitations. Although the BSS spectrum allocation implementation date is April 1, 2007, the Commission must still open a notice and comment period, evaluate proposals, initiate a filing window, and process applications

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Memorandum Opinion and Order, 9 FCC Rcd 1943 (1994); *Second Memorandum Opinion and Order*, 9 FCC Rcd 7797 (1994).

in a relatively short time period. Realistically, a BSS licensee must begin construction of spacecraft by 2004 in order to deploy service timely.

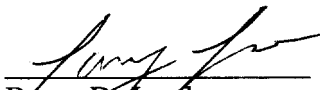
Conclusion

For all of the aforementioned reasons, Pegasus Development Corporation requests that the Commission deny the Petition for Clarification and Reconsideration of Winstar Communications, Inc., and modify its policies with respect to the new BSS allocations as described herein.

Respectfully submitted,

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Dated: November 13, 2000

CERTIFICATE OF SERVICE

I, Julia Colish, hereby certify that on this 13th day of November, 2000, I have served by hand deliver or first class U.S. mail(*) a copy of this Opposition upon the following individuals:

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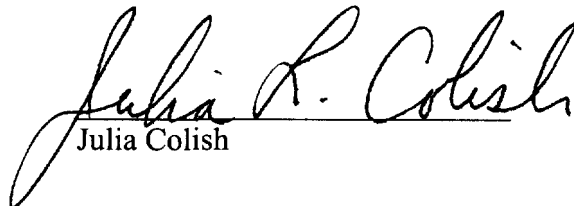
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